OAH 2-0320-30038

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

State Senator Scott Newman and State Senator Mike Parry,

Complainants,

vs.

Mark Ritchie, Minnesota State Secretary of State,

Respondent.

ORDER DENYING MOTION FOR RECONSIDERATION

On October 12, 2012, this matter came on for a probable cause hearing under Minn. Stat. § 211B.34, before Administrative Law Judge Bruce H. Johnson to consider a Complaint filed by Senators Scott Newman and Mike Parry. The Complaint alleged that the Respondent violated Minn. Stat. §§ 211B.04, 211B.06, and 211B.09.

By Order dated November 1, 2012, Administrative Law Judge Bruce H. Johnson dismissed the Complaint for lack of probable cause. On November 5, 2012, the Complainants submitted a petition for reconsideration of Judge Johnson's decision.

Frederic W. Knaak, Knaak & Associates, P.A., appeared in these proceedings on behalf of Senators Newman and Parry. Kristyn Anderson, Assistant Attorney General, appeared on behalf of Respondent Mark Ritchie.

Based on the record herein, and for the reasons stated in the following Memorandum the Chief Administrative Law Judge makes the following:

ORDER

Complainants' Motion for Reconsideration is DENIED.

Dated: November 7, 2012

s/Raymond R. Krause

RAYMOND R. KRAUSE
Chief Administrative Law Judge

NOTICE

Under Minn. Stat. § 211B.36, subd. 5, this Order is the final decision in this matter and a party aggrieved by this decision may seek judicial review as provided in Minn. Stat. §§ 14.63 to 14.6.

MEMORANDUM

The Complainants are Minnesota State Senators. The complaint they filed alleges that Secretary of State Mark Ritchie violated several campaign practice statutes in an effort to sway voters to oppose the constitutional ballot question regarding voter identification.

On November 1, 2012, Administrative Law Judge Bruce Johnson issued an Order dismissing the Complaint in this matter for lack of probable cause to believe that the Respondents violated Minn. Stat. §§ 211B.04, 211B.06 and 211B.09 as alleged. On November 5, 2012, the Complainants requested reconsideration of the Dismissal Order.

Minn. Stat. § 211B.34, subd. 3(b), provides that the Chief Administrative Law Judge must review the petition for reconsideration within three business days and determine whether the assigned administrative law judge made a "clear error of law."

Minn. Stat. 211B.09

Minn. § 211B.04, provides in part:

> An employee or official of the state of a political subdivision may not use official authority or influence to compel a person to…take part in political activity.

The ALJ found that no evidence had been submitted to demonstrate that Mr. Ritchie compelled anyone to take part in political activity. Complainants merely asserted that one could infer compulsion because he was the agency head.

The ALJ stated that mere inference is insufficient to raise a fact question or establish probable cause.[1] A finding of probable cause must be supported by evidence with probative value.[2] This was not a clear error of law.

Minn. Stat. 211B.06

Minn. Stat. § 211B.06 prohibits a person from intentionally participating in the preparation or dissemination of campaign material that is false and which the person knows is false or communicates to others with reckless disregard of whether it is false.

[1] *Bob Useldinger & Sons, Inc. v. Hangsleben,* 505 N.W.2d 323, 328 (Minn. 1993); *Carlisle v. City of Minneapolis,* 437 N.W.2d 712, 715 (Minn. App. 1988).
[2] *State v. Florence,* 239 N.W. 2d 892 Minn. (1976).

The term "reckless disregard" was added to the statute in 1998 to expressly incorporate the "actual malice" standard applicable to defamation cases involving public officials from *New York Times v. Sullivan*.[3]

Based on this standard, the Complainants would have the burden at the hearing to show by clear and convincing evidence that the Respondent prepared or disseminated the material knowing that it was false or did so with reckless disregard for its truth or falsity. The test is subjective; the Complainant must come forward with sufficient evidence to prove the Respondent "in fact entertained serious doubts" as to the truth of the material or acted "with a high degree of awareness" of its probable falsity.[4]

In the Petition for Reconsideration, the Complainants argue that the Dismissal Order is clearly erroneous as a matter of law. First, the Complainants contend that Judge Johnson erred when he relied on the affidavit of Mr. Ritchie without the opportunity for Complainants to cross examine him. They argue that under *State v. Florence* the court found that it was not proper to make an "assessment of the relative credibility of conflicting testimony".[5] They go on to assert that one could reasonably infer that a person making the statements in question did so knowingly or without regard for their accuracy.

First of all, Judge Johnson did not make credibility determinations. He simply, and accurately, described the burden facing a complainant; that is, a complainant must provide some evidence with probative value to support the claim. He then determined that an inference alone is insufficient to meet that burden.

Second, Administrative Law Judge Johnson found that the statements at issue were, in any case, either substantially accurate, opinion, permissible policy statements, not statements that were subject to proof or disproof, or merely a question and as such could not form the basis of a § 211B.06 complaint.

Neither of these conclusions constitutes a clear error of law.

Minn. Stat. §§ 10.60 and 211B.04

Next, Complainants challenge the ALJ's interpretation of Minn. Stat. § 10.60 that the alleged use of the Secretary of State's website did not constitute "campaign materials." They suggest, without support, that the materials on a state-supported website should have even greater scrutiny than non-state-funded materials. They argue that the ALJ improperly relied on the affidavit of Beth Fraser in reaching his interpretation of the statute.

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[3] *New York Times v. Sullivan*, 376 U.S. 254, 279-80 (1964); *State v. Jude*, 554 N.W.2d 750, 754 (Minn. App. 1996).

[4] *St. Amant v. Thompson*, 390 U.S. 727, 731 (1968); *Garrison v. Louisiana*, 379 U.S. 64, 74 (1964). *See also Riley v. Jankowski*, 713 N.W.2d 379 (Minn. App.), *rev. denied* (Minn. 2006).

[5] *State v. Florence*, 306 Minn. 442, 239 N.W. 2d892 (1976).

First, Ms. Fraser's beliefs about statutory pre-emption are not facts to be proven or disproven. They are an opinion of her belief in what the law means. There is no need to cross examine her on her legal opinion.

Second, the ALJ relied on statute and recent precedent in making his decision that the material on the website did not rise to the level of "express advocacy". His finding is admittedly subjective but certainly within the realm of reasonable and not a clear error of law.

Finally, even if one took a different view of what "influence… the defeat of a ballot question" means, Minn. Stat. §10.60 is clear and unambiguous that policy positions related to the legal functions, duties, and jurisdiction of a public official or organization are permitted on a website such as the Secretary of State's. There is no language in §10.60 that requires a disclaimer.

Conclusion

A finding of "clear error of law" is a significant burden that the Complainants have not overcome. Administrative Law Judge Johnson's conclusion that Mr. Ritchie's statements were substantially accurate and not factually false within the meaning of Minn. Stat. § 211B.06, was not clear error. His conclusion that the Complainant failed to put forward any evidence that Mr. Ritchie disseminated the statements either knowing they were false or with reckless disregard as to whether they were false was not clearly in error. His interpretation of Minn. Stat. § 10.60 is well supported by the rules of construction. Accordingly, the motion for reconsideration is denied.

R. R. K.